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GULA SABAH SDN BHD v. DIRECTOR OF LANDS AND SURVEYS DEPARTMENT, SABAH

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CELESTINA STUEL GALID JC
[ORIGINATING SUMMONS NO: BKI-24NCvC-73-7-2018]
B 15 OCTOBER 2018

LAND LAW: *State land – Cancellation of application for State land – Withdrawal of draft title – Whether Director of Lands and Surveys Department ('Director of Lands') empowered to cancel land application – Whether company complied with* C *terms and conditions of letter of offer – Whether Director of Lands justified in cancelling land application and forfeiting premium paid by company – Whether company denied right to be heard – Land Ordinance (Sabah) (Cap 68), ss. 9 & 41(1) – Land Rules 1930, r. 2(9)*

D The appellant applied for a State land measuring 8500 acres for the purpose of planting sugar cane ('the land application'). A letter of offer was issued to the appellant pursuant to the land application. The appellant accepted the letter of offer and paid 50% of the premium. A draft title made pursuant to the land application was issued by the respondent. Several years later, the Jabatan Insolvensi Malaysia informed the respondent that the appellant had E been wound up. The Assistant Collector of Land Revenue ('ACLR') thus decided to cancel the land application. The appellant filed an application for revision of the ACLR's decision. Pursuant to the said revision application, the Director of Lands and Surveys Department, Sabah ('the respondent') decided to set aside the order made by the ACLR. In addition, the respondent F cancelled the land application and withdrew the draft title and directed the appellant to return the original copy of the draft title. The respondent also forfeited the premium paid by the appellant pursuant to r. 2(9) of the Land Rules 1930 ('Land Rules'). Dissatisfied, the appellant appealed. The issues that arose were (i) whether the respondent was empowered under the Land G Ordinance (Sabah) (Cap 68) ('the Ordinance') and/or Land Rules ('the Rules') to cancel the land application; (ii) whether the ground(s) relied on by the respondent in cancelling the land application and/or forfeiting the premium paid by the appellant were justified; and (iii) whether the appellant was denied the right to be heard before the respondent decided to cancel the land application and/or forfeit the premium paid by the appellant.

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Held (dismissing appeal with costs):

(1) The appellant had not, at the material time, complied with the terms and conditions of the letter of offer. The appellant had failed to cause the draft title to be registered although 13 years had passed since the letter I of offer was issued. In addition, at the time of the respondent's decision, the appellant still had not paid the balance of the premium payable

contrary to the terms of the letter of offer. The respondent had rightly considered all these factors before deciding to cancel the letter of offer. The respondent was thus empowered under s. 9 of the Ordinance to cancel the land application and under r. 2(9) of the Land Rules to forfeit the premium paid by the appellant. (paras 33 & 41)

(2) The respondent had not erred and had properly exercised his discretion under s. 9 of the Ordinance to cancel the land application. The present case was distinguishable from the cases which dealt with s. 9 of the Ordinance as there was already a letter of offer and a draft title issued. Section 41(1)(d) of the Ordinance barred the appellant from further appealing against the respondent's decision. This appeal was therefore incompetent and may be dismissed on this ground alone (para 34)

(3) The appellant itself had raised the issue regarding the non-compliance of the terms and conditions of the letter of offer in the appeal before the respondent. The respondent was entitled and had correctly considered this issue when determining the appeal and in deciding the way that he did. Thus, the allegation that there was breach of natural justice or that the appellant was not given the opportunity to be heard before the cancellation of the land application was without any merit. (para 41)

Case(s) referred to:

Borneo Samudera Sdn Bhd v. Ina Yapp Pui Vun & Anor [2017] 1 LNS 728 HC ***(refd)***

Lim Fong Tsin & Ors v. The Assistant Collector of Land & Ors [1997] 1 LNS 7 HC ***(refd)***

Rajesh Datuk Yusof v. Director of Lands and Surveys, Sabah & Anor [2005] 8 CLJ 566 HC ***(refd)***

Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands and Surveys, Sabah [1994] 3 CLJ 229 HC ***(refd)***

The State Government of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors [2017] 2 CLJ 379 CA ***(refd)***

Workon Sdn Bhd v. The Director of Lands And Surveys, Sabah & Ors [1999] 1 LNS 40 HC ***(refd)***

Legislation referred to:

Land Ordinance (Sabah) (Cap 68), ss. 9, 41(1)(d), 42, 47(3), 88

Land Rules (Sabah), r. 2(4), (5), (6), (9)

For the appellant - Arlene Philip, Christine Gloria Linus & Muhamad Amirul Amin; M/s VK Liew & Partners

For the respondent - Dygku Fazidah Hatun Pg Bagul; State Counsel, Sabah

Reported by Suhainah Wahiduddin

JUDGMENT

Celestina Stuel Galid JC:

Introduction

[1] By this originating summons, the appellant sought for the following orders:

(a) that the decision of the Deputy Director of Lands and Surveys Department, Kota Kinabalu, Sabah given on 25 April 2018 pursuant to Siasatan Tanah Pengarah (Semakan) No. 22 Tahun 2015 be set aside;

(b) that the appellant's Land Application No. 91180681 approved and issued with Offer to Alienate Land Under a Rujukan L.S. 180.1.657/52 JL/hjs dated 1 December 1992 be restored;

(c) that the document of title for the said land application made under CL 185312314 be issued to the appellant;

(d) that the order by the Deputy Director of Lands and Surveys Department, Kota Kinabalu, Sabah for the return of the original draft document of title for CL 185312314 and for forfeiting the sum of RM420,000 paid by the appellant *vide* Resit No. 14110419 dated 30 November 1993 be set aside;

(e) that such further and/or consequential orders or relief or directions as the court deems fit; and

(f) that the costs of and incidental to this appeal be paid by the respondent.

[2] The appeal is opposed to by the respondent.

Salient Background Facts

[3] The respondent has set out the background facts leading up to the appeal in para. 5 of the affidavit in opposition (encl. 24). The appellant in their affidavit in reply (encl. 25) did not dispute these facts, the same of which are reproduced below:

(i) In or around 1991, the appellant applied for a State land measuring more or less 8500 acres in Kuala Penyu for the purpose of planting sugar cane. The land application was registered as LA No. 91180681 ("the land application");

(ii) In or around 1992, a letter of offer was issued to the appellant pursuant to the land application. The letter of offer expired on 30 November 1993. The terms and conditions of the letter of offer, *inter alia*, include the following:

(a) the appellant is required to pay a premium of RM840,000 wherein 50% of the said premium must be paid when the appellant accepted the letter of offer;

(b) the owner covenants to develop 75% of the said land ie, by planting sugar cane before the year 2000;

(c) in the event the appellant failed to comply with the terms and conditions of the letter of offer and failed to sign the draft land title within six months from the date of service of the notice, the letter of offer shall be cancelled.

(iii) The appellant accepted the letter of offer and paid 50% (RM420,000) of the premium on 30 November 1993;

(iv) In or around 1999, a draft title bearing No. CL 185312314 made pursuant to the land application was issued by the respondent;

(v) On or around 11 March 2013, the Jabatan Insolvensi Malaysia informed the respondent that the appellant had been wound up on 25 May 2012;

(vi) On 27 July 2013, pursuant to a land enquiry (PPHT) Kuala Penyu No. 9 Tahun 2013 Kaedah No. 2(6) Kaedah-Kaedah Tanah, the Assistant Collector of Land Revenue ("ACLR"), Kuala Penyu decided to cancel the land application on the ground that the appellant had been wound up on 25 May 2012;

(vii) On 17 June 2015, the appellant through its solicitors filed an application for revision of the ACLR's decision;

(viii) On 25 April 2018, pursuant to the said revision application, the respondent decided to set aside the order made by the ACLR. In addition, the respondent cancelled the land application and withdrew the draft title CL 185312314 and directed the appellant to return the original copy of the draft title CL 185312314. The respondent also forfeited the premium paid by the appellant pursuant to r. 2(9) of the Land Rules 1930; and

(ix) Being dissatisfied with the decision of the respondent, the appellant filed the present appeal.

This Decision By The Deputy Director Of Lands And Surveys Department

[4] As enumerated in the background facts above, upon the revision application by the appellant, the respondent had set aside the decision of the ACLR which cancelled the land application on the ground that the appellant had been wound up.

[5] The respondent came to that conclusion after noting that the winding-up order against the appellant had been stayed on 23 June 2017.

[6] However, the respondent went on further to note that in any event, the appellant had not fulfilled its obligation under the letter of offer dated 1 December 1992 namely for the appellant to cause the draft title to be registered. This despite a reminder *via* the department's letter dated 2 September 2005 which drew the appellant's attention to the fact the draft title has as at that date not been submitted for registration and that there was an outstanding sum of RM629,163 to be paid.

[7] In addition, the respondent was of the view that the letter of offer was not final or conclusive (muktamad) as the appellant was still to pay the balance of the premium and to develop not less than 75% of the land area before the year 2000. These were not complied by the appellant.

[8] The respondent held that the issue of legitimate expectation did not arise as the appellant was well aware of its obligations under the letter of offer but did not comply with them until it was wound up.

[9] As to the issue of whether the court's sanction was required, the respondent held that it was not a requirement for an enquiry before the ACLR under r. 2(6) of the Land Rules.

The Grounds Of Appeal

[10] The appellant's grounds for appeal are as follows:

(i) that while the respondent was correct in law in setting aside the order by the ACLR made on 22 July 2013, he erred in law and in fact when he unilaterally cancelled the appellant's land application and withdrew the draft title CL 185312314 in direct contravention of r. 2(5) of the Land Rules 1930 which only empowers the Collector to cancel any land application;

(ii) that the respondent was wrong in law and in fact when he directed the appellant to return the original document of draft title and when he further ordered the sum of RM420,000 paid as land premium by the appellant to be forfeited purportedly pursuant to r. 2(9) of the Land Rules 1930 when the said Rule does not empower him to do so;

(iii) that the respondent was wrong in law and in fact when he held, *inter alia*:

(a) that the principle of natural justice was not breached when he has in fact failed, refused and or neglected to afford the appellant an opportunity to be heard before making the decision to cancel the land application;

(b) that the issue of legitimate expectation does not arise;

(c) that leave of court was not necessary at the time the ACLR made a decision in 2013 to cancel the land application on the ground that the appellant was wound up;

(d) that the appellant had failed to carry out its obligations in the offer made by the Lands and Surveys Department where the appellant failed to get the draft title registered; and

(e) for taking irrelevant consideration when making his decision.

This Court's Decision

[11] Based on the appellant's grounds of appeal, I am of the view that the following issues are relevant to be considered:

(a) whether the respondent is empowered under the Land Ordinance ("the Ordinance") and/or Land Rules ("the Rules") to cancel the land application;

(b) if the answer to the first issue is in the affirmative, whether the ground(s) relied on by the respondent in cancelling the land application and or forfeiting the premium paid by the appellant was/were justified in the circumstances of the case; and

(c) whether the appellant was denied the right to be heard before the respondent decided to cancel the land application and/or forfeit the premium paid by the appellant.

[12] It was submitted by learned counsel for the appellant that the respondent had gone "on a frolic of his own without regard to the provision of the law and the principle of natural justice". It was further contended that the respondent had acted outside of his jurisdiction when he decided to cancel the land application and withdrew the draft title.

[13] In support, learned counsel for the appellant cited the case of *Borneo Samudera Sdn Bhd v. Ina Yapp Pui Vun & Anor* [2017] 1 LNS 728; [2016] MLJU 1752 where Ravinthran Paramaguru J quashed and set aside part of the decision made by the Assistant Collector of Land Revenue on the ground that it was *ultra vires* to the Ordinance. In addition, the case of *Rajesh Datuk Yusof v. Director of Lands and Surveys, Sabah & Anor* [2005] 8 CLJ 566 was also cited to contend that the exercise of a power not expressly provided in the Ordinance and the Rules would be void.

[14] For the respondent, the learned State Counsel submitted that although r. 2(5) of the Rules empowers the Collector to cancel any land application, the respondent is not precluded from also invoking this power as it is provided under s. 47(3) of the Ordinance that:

> (3) In addition to the powers conferred upon him by this Ordinance the Director may exercise the powers of a Collector.

[15] Thus, it was further submitted that the respondent was not in excess of his jurisdiction when he made the order to cancel the land application and to withdraw the document draft title and forfeit the sum of RM420,000.

[16] In answer, it was contended by learned counsel for the appellant that the respondent's power has to be read together with s. 42 of the Ordinance, which provides that no order or decision shall be made to the prejudice of any person unless such person has been given an opportunity to be heard. It

was submitted that the appellant was not given the right to be heard when the respondent made the decision to cancel the land application and forfeit the premium paid.

[17] Quite apart from the submissions by learned counsel for the appellant, there is in fact a provision in the Ordinance which expressly empowers the respondent to deal with alienation of lands.

[18] Section 9 of the Ordinance provides as follows:

> (1) Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions in respect thereof to be set out in the title.
>
> (2) In particular such conditions may specify the particular product or class of products which or which alone is to be cultivated, and may forbid the cultivation of any particular product or class of products.

[19] Ian Chin J had the occasion to consider both ss. 9 and 41(1) of the Ordinance in the case of *Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands and Surveys, Sabah* [1994] 3 CLJ 229 wherein the issue before the court was whether the decision of the respondent in not issuing the offer to alienate land to the appellant was appealable under s. 41(1) of the Ordinance.

[20] In that case, the respondent had offered to alienate some 225 acres of land to one Ko-Nelayan which accepted by paying 25% of the premium payable. A year later, the appellant applied for 25 acres to be excised from the land offered to Ko-Nelayan which was approved by the Secretary of the Natural Resources, Chief Minister's Office. However, the respondent subsequently issued two separate titles in respect of the land offered to Ko-Nelayan. The appellant demanded that the respondent issue them the offer to alienate the said 50 acres. The respondent refused.

[21] His Lordship held that:

> [4] When the respondent (herein) decided not to issue the offer to alienate land to the appellant, the respondent was in fact making a decision not to alienate the land to the appellant. The decision rejecting any application for land is clearly an exercise of the discretion granted by s. 9 of the Ordinance. This being the case, the appeal is therefore an appeal against a decision not to alienate state land within the meaning of s. 9 aforesaid. The appeal is thus incompetent, it being prohibited by s. 41(1)(d) of the Ordinance.

[22] This issue further came up before His Lordship Richard Malanjum CJSS (now CJ of Malaysia) in the case of *Lim Fong Tsin & Ors v. The Assistant Collector of Land & Ors* [1997] 1 LNS 7; [1997] MLJU 484 where the court dealt with two issues namely, the status of a land application under the Sabah Land Ordinance and the authority to approve any land application and to issue title deed thereof.

[23] His Lordship agreed with the decision by Ian Chin J that s. 9 of the Ordinance gives the Director the discretion on the alienation of State land subject to any general or special direction of the Minister. His Lordship however went on further to note that unless the Director's decision was made for improper motive or unreasonable or such other grounds, the Director's decision pursuant to s. 9 of the Ordinance should stand. On the facts of the case, His Lordship found that the plaintiffs' allegation that there had been a breach of natural justice was without any merit.

[24] In another case, *Workon Sdn Bhd v. The Director of Lands And Surveys, Sabah & Ors* [1999] 1 LNS 40; [1999] 4 MLJ 177, Richard Malanjum J (as His Lordship then was) considered the application of s. 9 of the Ordinance in the context of an application for *mandamus* to compel the Director of Lands & Surveys to issue the document of title to the applicant. The applicant therein had been given an approval to register a draft title of a piece of land, which offer was accepted by the applicant. The applicant had also paid the necessary premium.

[25] His Lordship dismissed the application, *inter alia*, holding as follows:

> Meanwhile, I have noted the view expressed by the learned counsel for the applicant on the interpretation of s. 9 of the Ordinance as a possible answer to the preceding point. *However, to agree with him would tantamount to saying that once a letter of offer is issued there is no reversal and that a successful applicant is in good a position as a registered owner. That I think is not the intention of the Ordinance. Section 88 is clear on that.* At best therefore such applicant, as the applicant in this case, may only have a valid contract with the respondent. And that seems to be the view as well of learned counsel for the applicant when he submitted that: 'the state government in effect will be a party to a legally binding agreement.' Thus, there is an alternative remedy in such a situation, namely for the applicant to go for a civil action for breach of contract if at the end of the day the acceptance of the letter of offer comes to nothing. Such a course of action would, I think, be more convenient, beneficial and effective in view of the discretionary nature of s. 9 of the Ordinance. (emphasis added)

[26] Although s. 9 of the Ordinance was not specifically considered by the Court of Appeal in the case of *The State Government of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors* [2017] 2 CLJ 379; [2017] 3 MLJ 127, the court also dealt with the issue of whether the plaintiffs therein had legitimate expectation to be issued with title deeds for the subject lands pursuant to the letters of offer issued to them. The plaintiffs had also paid 50% of the premium payable for the lands. Despite that, the Lands and Surveys Department subsequently informed the plaintiffs that the registered survey plans for their land applications could not be issued because the lands were within the Forest Reserve of Madai Baturong.

[27] The Court of Appeal allowed the appeal, *inter alia*, holding as follows:

> [24] Having said that, we agree with the submissions of the learned state counsel that there is no basis to apply the law of contract on the facts of the present appeal. The alienation of state land is regulated by the Sabah Land Ordinance which lays out clear provisions on the process of alienation of land in the state of Sabah.
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> [25] *It is plain and clear that s. 12 of the Sabah Land Ordinance and r. 2 of the Sabah Land Rules do not recognise mere application for land and any payment made pursuant thereto as an undertaking that, the application for land has been approved … And under s 88, it is clearly provided that any interest in land shall be valid only upon registration of title …*
>
> [26] The learned JC had erred to have ruled that the plaintiffs had legitimate expectation purely on the two offer letters to alienate lands to the plaintiffs which state clearly that the offer was conditional upon availability of unencumbered state lands upon survey. *The doctrine of legitimate expectation does not apply and cannot override the legal provision as clearly stipulated under the Sabah Land Ordinance …* (emphasised added)

[28] Reverting back to the present case, one of the grounds relied on by the appellant in the appeal against the decision by the ACLR before the respondent was that the land in question was no more a State land as it had been "alienated" to the appellant and 50% of the premium had been paid. Accordingly, it was submitted that the appellant was in law entitled to a legitimate expectation not to have the alienation approval revoked.

[29] In answer to the submission by learned counsel for the appellant on this issue, the respondent held that the issue of legitimate expectation did not arise as the appellant had at all material time the opportunity and time to register the draft title and/or develop the land. However, the appellant did not do anything until it was eventually wound up.

[30] As for the letter of offer, the respondent was of the view that it was not final or 'muktamad' and still subject to compliance of the terms stated therein which the appellant failed to do.

[31] Although the respondent did not specifically premise his decision to cancel the letter of offer on s. 9 of the Ordinance, I am of the considered view that it nevertheless did not detract from the fact that the respondent was vested with the discretion to do so as shown in the cases cited above.

[32] As this ground was raised in the appeal before the respondent, it was well within the powers of the respondent to consider and decide on the issue. Furthermore, the appellant had, *inter alia*, sought for an order that the document of title for the land be issued to the appellant, that the appellant pay the balance of the premium for the land and that the appellant be allowed to proceed with the alienation approval of the land application "notwithstanding any subsequent lapse of offer made by the Lands and Surveys Department to the appellant".

[33] Based on the appellant's prayers in the appeal before the respondent, it can hardly be disputed that the appellant had not at the material time complied with the terms and conditions of the letter of offer. The appellant had failed to cause the draft title to be registered although 13 years had passed since the letter of offer was issued. In addition, it was a fact that at the time of the respondent's decision, the appellant still had not paid the balance of the premium payable contrary to the terms of the letter of offer. The respondent had rightly considered all these factors before deciding to cancel the letter of offer.

[34] Having regard to all of the above, I am of the view that the respondent had not erred and had properly exercised his discretion under s. 9 of the Ordinance to cancel the land application. In so holding, I took note of the submission by learned counsel for the appellant that the present case is distinguishable from the cases which dealt with s. 9 of the Ordinance as there was already a letter of offer and a draft title issued. The short answer to this is that that it was so did not fetter the discretion of the respondent not to alienate the land and only registration under s. 88 of the Ordinance would vest interest in the applicant – see *The State Government of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors.*

[35] It is provided under s. 41(1)(d) of the Ordinance that:

> (1) An appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court:
>
> Provided that no appeal shall be admitted
>
> …
>
> (d) from any decision of the Director under section 9 of this Ordinance.

[36] Per Ian Chin J in *Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands and Surveys, Sabah,* the Director's decision pursuant to s. 9 of the Ordinance is not appealable by virtue of s. 41(1)(d) of the Ordinance. As I have found that the respondent's decision was made in accordance with s. 9 of the Ordinance, I would also find that that s. 41(1)(d) of the Ordinance bars the appellant from further appealing against the respondent's decision. This appeal is therefore incompetent and may be dismissed on this ground alone.

[37] With regard to the power of the respondent to forfeit the premium paid by the appellant, it is provided under r. 2(4) of the Rules that:

> No payments made under subrule (3) shall confer any right whatsoever to the land applied for and acceptance of any such payment shall not constitute any undertaking that the application will be approved.

[38] Rule 2(6) of the Rules provides that:

> If the application is **refused**, any sums paid under subrule (3) shall be refunded to the applicant. (emphasis added)

[39] Rule 2(9) of the Rules on the other hand provides that:

> When an application has been **cancelled** by the Collector under subrule (5) any sums paid by the applicant under subrule (3) shall be forfeited to the Government. (emphasis added)

[40] I have already earlier held that the respondent had correctly exercised his discretion to cancel the land application. This was not a case where the respondent had merely refused the land application but where there was already a letter of offer issued for the land application and the draft title issued. As such, I do not see how r. 2(6) of the Rules could apply to the appellant instead.

Conclusion

[41] Based on my findings above, I answer the three issues posed as follows:

(a) the respondent is empowered under s. 9 of the Ordinance to cancel the land application and under r. 2(9) to forfeit the premium paid by the appellant;

(b) the respondent had correctly exercised his discretion in cancelling the land application based on the fact that the appellant had failed to comply with the terms and conditions of the letter of offer including (i) the payment of the balance premium sum and (ii) for the draft title to be registered within the time prescribed thereunder; and

(c) the appellant itself had raised the issue regarding the non-compliance of the terms and conditions of the letter of offer in the appeal before the respondent. The respondent was entitled and had correctly considered this issue when determining the appeal and in deciding the way that he did. Thus, the allegation that there was breach of natural justice or that the appellant was not given the opportunity to be heard before the cancellation of the land application is without any merit.

[42] Accordingly and for the reasons stated above, I find no merits in the appeal. The appeal is therefore dismissed with costs subject to payment of allocatur fees.